

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**GORDON A. WOGAN**

Claimant

VS.

**CONSOLIDATED FREIGHTWAYS, INC.**

Respondent

Self-Insured

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Docket No. 201,820

**ORDER**

Respondent appealed the March 20, 1997, Award entered by Special Administrative Law Judge William F. Morrissey. The Appeals Board heard oral argument in Kansas City, Kansas, on August 19, 1997.

**APPEARANCES**

Claimant appeared by his attorney, Gary R. Terrill of Overland Park, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Frederick J. Greenbaum of Kansas City, Kansas. There were no other appearances.

**RECORD**

The Appeals Board considered the record listed in the Special Administrative Law Judge's Award.

**STIPULATIONS**

The Appeals Board adopted the stipulations listed in the Special Administrative Law Judge's Award. In addition, the parties, in a stipulation filed on October 4, 1996, agreed that respondent overpaid claimant \$13,085.68 in temporary total and temporary partial disability benefits.

**ISSUES**

The Special Administrative Law Judge awarded claimant a 57.5 percent work disability for a work-related right shoulder and neck injury. Respondent contends claimant did not suffer a neck injury but only injured his right shoulder in a work-related accident that occurred on January 24, 1994. Therefore, the dispute in this case centers around whether claimant is limited to permanent partial disability benefits based on a scheduled injury or a whole body injury.

Claimant, on the other hand, contends the record proves he is entitled to an award for a larger work disability. The parties stipulated the respondent overpaid the claimant temporary total and temporary partial benefits. The claimant contends the overpayment amount should not be credited against the claimant's award but should be repaid to the respondent by the workers compensation fund.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

On the date of claimant's injury, January 24, 1994, claimant had been working for the respondent as an over-the-road truck driver for seven years. Claimant alleges he injured his right shoulder and neck when his left foot slipped as he was climbing into the cab of his tractor-trailer in Strong City, Kansas. Claimant testified he was pulling himself up into the cab of the tractor-trailer by grasping a handrail located next to the door of the cab. Claimant had his left foot braced on the cab when it slipped off the cab of the truck. Claimant kept ahold of the bar after he slipped. Claimant testified he immediately felt pain and discomfort in his right shoulder and neck. Claimant was able to drive back to respondent's terminal located in Kansas City, Missouri. Upon arriving at the terminal, claimant immediately notified respondent of the accident and filled out an accident report.

The next day claimant's right shoulder and neck remained symptomatic. He contacted the respondent and was sent to the Business and Industry Health Group (BIHG) in Kansas City, Missouri, for examination and treatment. Claimant was seen by Dr. Garcia, a physician employed by BIHG, on January 25, 1994, the day after the accident. The medical records for that day were admitted into the record and note that claimant complained of pain and pressure at the right side of his neck and right shoulder. Dr. Garcia told claimant to treat his shoulder with ice packs and he also prescribed pain medication. Claimant was sent for an MRI examination which was negative for a rotator cuff tear. At that time, claimant was also referred to physical therapy for examination and treatment.

Claimant continued a regimen of physical therapy treatments and pain medication through BIHG until March 11, 1994. Because claimant was not improving, Dr. Garcia

referred claimant to Dale E. Darnell, M.D., an orthopedic surgeon located in Kansas City, Missouri, for further examination and treatment.

While claimant was receiving treatment with BIHG, respondent had claimant perform light-duty work from the date of his injury, January 24, 1994, through April 5, 1994. Claimant worked 40 hours at \$6.00 per hour and was paid temporary partial disability benefits of \$378.86 per week in addition to his earned wages. The temporary partial disability benefits were paid at the State of Missouri's compensation rate.

Dr. Darnell first examined claimant on April 1, 1994. He found claimant had complaints of pain and discomfort in his right shoulder. Dr. Darnell's medical notes do not indicate that claimant made any complaints in reference to a neck injury. In fact, the doctor found claimant's range of motion of the cervical spine was normal. Dr. Darnell referred claimant for additional physical therapy rehabilitation.

Under Dr. Darnell's direction, claimant was seen on April 5, 1994, by Metro North Physical Therapy and Sports Clinic. In the initial interview and report completed by a physical therapist, the claimant complained of neck stiffness and headaches. This additional physical therapy treatment did not improve claimant's right shoulder condition. Therefore, Dr. Darnell on April 25, 1994, performed diagnostic arthroscopy surgery on claimant's right shoulder.

The doctor did not find a rotator cuff tear but did find minimal synovitis and a significant labral tear which he repaired. After surgery, claimant's arm was immobilized. Post-surgery, the claimant was placed back into the physical therapy rehabilitation program.

Dr. Darnell returned claimant to work on October 3, 1994, with the one restriction of not to perform the procedure of hooking two trailers together. Respondent returned claimant to his regular truck driving job on October 12, 1994. Claimant made one trip from Kansas City, Missouri, to Liberal, Kansas, and back to Kansas City, Missouri. After that trip, claimant's right shoulder became more symptomatic and Dr. Darnell again took claimant off work.

Claimant's right shoulder was not improving, therefore, Dr. Darnell referred claimant for an evaluation of the shoulder to orthopedic surgeon Steven Joyce, an associate of Dr. Darnell's in the same medical group. On February 1, 1995, Dr. Joyce performed diagnostic arthroscopic surgery on claimant's right shoulder. After the surgery, claimant was instructed to do home exercises instead of further physical therapy treatment.

Although claimant's right shoulder remained symptomatic and his loss of range of motion had not improved, Dr. Darnell on March 21, 1995, told claimant he had no more treatment options for claimant. Claimant was released on March 21, 1995, with permanent restrictions and impairment of function rating of 25 percent of the right upper extremity including the right shoulder.

Claimant returned with the permanent restrictions to the respondent. Respondent, however, was not able to accommodate the restrictions. At claimant's evidentiary deposition on May 20, 1996, claimant testified that since his medical release on March 21, 1995, he had worked two jobs. Claimant was first employed by Harrah's, a gambling casino in Kansas City, Missouri, for three months as a security guard. But, he was terminated from that job for insubordination.

Following the security guard job, claimant testified he was off work for approximately a month. He then obtained the truck driving job delivering auto parts, but he left the truck driving job because of continuing problems with his neck and shoulder. Claimant also testified the medication he was taking for the pain and discomfort caused him to be drowsy while he was driving the truck. Claimant left the truck driving job approximately March 1, 1996, and was actively looking for work on the date of his deposition.

#### Nature and Extent of Claimant's Disability

The Special Administrative Law Judge awarded claimant permanent partial disability benefits of 57.5 percent based on a work disability as defined in K.S.A. 44-510e. Respondent contends claimant's injury is limited to his right shoulder. Therefore, he is entitled to only permanent partial disability benefits based on the loss of use of his right arm including the shoulder, as listed in the schedule of injuries found at K.S.A. 44-510d(a)(13). In contrast, claimant contends he has proven he sustained not only an injury to his right shoulder but also to his neck. Claimant requests the Appeals Board to affirm the Special Administrative Law Judge's finding that he is entitled to a work disability. The claimant, however, asserts the work disability should be substantially higher. Claimant argues he has presented evidence in the record that proves a 92.5 percent work disability.

The Appeals Board recognizes that claimant has consistently testified he had pain and discomfort in his neck in addition to the pain and discomfort in his right shoulder. Claimant also testified he complained of pain and pressure on the right side of his neck and his right shoulder when he received his first medical treatment on January 25, 1994, the day following the accident, at the BIHG. Furthermore, the physical therapy treatment records at BIHG and Metro North Physical Therapy and Sports Clinic contain references to claimant's neck complaints. The medical records of the physicians who treated claimant, however, other than the first medical treatment record at BIHG, do not mention neck symptoms.

Claimant was treated by orthopedic surgeons, Dr. Darnell and Dr. Steve Joyce of the Dickson-Diveley Midwest Orthopaedic Clinic, Inc., from April 1, 1994, through March 21, 1995. These orthopedic surgeons performed arthroscopic surgery on claimant's right shoulder on April 25, 1994, and February 1, 1995. Claimant was seen by either one or the other of these doctors on 20 occasions during this period of treatment. Their medical records are part of the evidence and do not contain any complaints by the claimant of neck pain or discomfort. In fact, the medical record of claimant's initial visit with Dr. Darnell on

April 1, 1994, indicates Dr. Darnell found, "Motion about his cervical spine is normal." Dr. Darnell testified claimant, "never said one word to me about his neck." The doctor also was asked if it was possible for claimant to have injured his cervical spine in the January 24, 1994, work accident. Dr. Darnell answered, "No, I don't think so . . . ."

Two other physicians testified in this case. P. Brent Koprivica, M.D., examined and evaluated claimant at the request of claimant's attorney on April 17, 1995. Dr. Koprivica is board certified in emergency medicine. The doctor's practice since 1992 has been primarily performing independent medical examinations.

Dr. Koprivica found, in addition to claimant's right shoulder injury, that he had sustained a soft-tissue injury to his cervical spine. The doctor attributed the soft-tissue cervical spine injury to claimant's January 24, 1994, accident. Based on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), Dr. Koprivica found claimant to have a 9 percent whole body functional impairment taking into consideration the chronic soft-tissue pain and loss of range of motion of the cervical spine.

The Administrative Law Judge appointed Peter V. Bieri, M.D., to perform an independent medical examination of claimant. Dr. Bieri examined and evaluated claimant on December 8, 1995. Dr. Bieri is a medical doctor who has a clinical practice but primarily performs independent medical evaluations and disability determinations.

Although claimant complained of neck pain, Dr. Bieri concluded, from his review of claimant's medical treatment records and his personal physical examination of claimant, that claimant had not sustained a permanent injury to his cervical spine. During Dr. Bieri's deposition testimony, however, claimant's attorney pointed out to the doctor that the physical therapy records following claimant's accident contained complaints made by claimant of pain and discomfort in his neck. Based on these complaints and the range of motion measurements made at the time Dr. Bieri examined claimant, the doctor then opined claimant had a 6 percent permanent functional impairment of the cervical spine. The doctor, however, never expressed an opinion that the 6 percent impairment rating to claimant's cervical spine was the result of the January 24, 1994, work-related accident. The doctor testified his "impromptu rating" of 6 percent impairment was based on claimant's complaint of pain for more than six months and the range of motion measurements.

On cross-examination by respondent's attorney, Dr. Bieri was made aware that his cervical spine range of motion measurements varied dramatically from the range of motion measurements made by Dr. Koprivica. The following chart represents the dramatic difference in the range of motion measurements found by Dr. Bieri as compared to Dr. Koprivica:

<u>Movement of Cervical Spine</u>	<u>Dr. Bieri's Measurements</u>	<u>Dr. Koprivica's Measurements</u>	<u>Degrees of Difference</u>	<u>Normal Measurements</u>
Flexion	60°	59°	- 1°	60°
Extension	70°	51°	-19°	75°
Right lateral flexion	45°	25°	-20°	45°
Left lateral flexion	30°	40°	+10°	45°
Right rotation	80°	40°	-40°	80°
Left rotation	60°	80°	+20°	80°

Dr. Bieri testified a variation between range of motion measurements found by a single evaluator of plus or minus 10 percent or five degrees, whichever is greater, rendered the range of motion findings invalid. Furthermore, Dr. Bieri testified the AMA Guides specifies that if the findings of the impairment evaluator are not consistent with those in the record, the step of determining the percentage of impairment is meaningless and should not be carried out until there is communication between the involved physicians or further clinical investigation resolves the disparity. Dr. Bieri also believes the range of motion measurements should be consistent from one examiner to another.

Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability. Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976). Furthermore, the finder of fact is free to consider all the evidence and decide for itself the percentage of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The Appeals Board finds, however, in this case, medical evidence is a significant factor that has to be heavily weighed in determining if claimant suffered a permanent neck injury in addition to his right shoulder injury.

The Appeals Board concludes the most persuasive medical evidence contained in the record is the opinion of claimant's treating physician, Dr. Darnell. Dr. Darnell treated claimant for almost a year. He operated on claimant twice and saw him on some 20 other different occasions. Therefore, the Appeals Board concludes Dr. Darnell's opinion should be given the most weight. Dr. Darnell was unequivocal when he testified that in his opinion the only injury claimant suffered in the January 24, 1994, work-related accident was an injury to his right shoulder. The other two physicians, who testified in this case, each only saw claimant on one occasion. Both of those physicians primarily perform medical evaluations and are not generally treating physicians.

Furthermore, the Appeals Board finds Dr. Bieri's 6 percent functional impairment rating to claimant's cervical spine is suspect. Dr. Bieri did not assess permanent impairment to claimant's cervical spine after his initial examination of claimant. Dr. Bieri's functional impairment rating to claimant's cervical spine was only made after accepting as true certain assumptions expressed to him in hypothetical questions during his deposition testimony. Dr. Bieri never attributed claimant's cervical spine functional impairment rating to claimant's work-related accident. Additionally, Dr. Bieri's functional impairment rating

was based on inconsistent range of motion measurements when compared to Dr. Koprivica's measurements.

The Appeals Board concludes the greater weight of the evidence proves claimant sustained only a right shoulder injury as the result of the work-related accident. Therefore, the Appeals Board finds the claimant is limited to permanent partial disability benefits as set forth in the schedule of injuries found at K.S.A. 44-510d(a)(13). Dr. Darnell opined in accordance with the AMA Guides, Third Edition (Revised) that claimant had a 25 percent permanent functional impairment rating to his right upper extremity including his shoulder as a result of his work-related injury. The Appeals Board finds Dr. Darnell's functional opinion is the most persuasive and, therefore, adopts this rating as the basis for the award.

#### Reimbursement of Overpayment of Temporary Total Disability Benefits

The parties stipulated the respondent overpaid claimant temporary total disability benefits in the amount of \$13,085.68. This overpayment was primarily caused by claimant receiving weekly temporary total disability benefits based on the higher weekly compensation rate paid by the State of Missouri. The claimant contends the workers compensation fund is required pursuant to K.S.A. 44-534a(b) to reimburse respondent for this overpayment. That statute generally provides for the workers compensation fund to reimburse the respondent for the overpayment of temporary total disability benefits that have either been paid voluntarily or pursuant to an order.

The Appeals Board notes that K.S.A. 44-525(b) also addresses overpayments made by the respondent. That statute generally provides that credit shall be given in the award for amounts paid by the respondent to the claimant as compensation prior to the date of the award. Effective April 4, 1996, the Legislature amended the statute and added subsection (c) which generally provides that an overpayment of temporary total disability benefits should be credited against claimant's additional disability benefits by first applying the credit to the final week of the award and then to each preceding week until the credit is exhausted. The claimant contends the 1996 amendment changed the law in existence prior to the amendment. Therefore, the claimant argues that prior to 1996, K.S.A. 44-525(b) did not allow a credit for an overpayment against a final award of benefits.

The Appeals Board disagrees with the claimant and finds the overpayment of temporary total disability benefits should be a credit against the claimant's final award of benefits. The Appeals Board concludes the workers compensation fund is only required to reimburse the respondent for overpayment of temporary total disability benefits under K.S.A. 44-534a(b) when there is not a final award of additional disability benefits for the overpayment to be credited against or the final award of disability benefits is less than the amount of credit. The Appeals Board finds, in the case at hand, the final award of disability benefits is less than the amount of the credit. The final award of permanent partial disability benefits amounts to \$12,084.93 and the stipulated credit is \$13,085.68. Accordingly, the respondent, pursuant to K.S.A. 1997 Supp. 44-534a(b), should request reimbursement from

the workers compensation fund for the overpayment of temporary total disability benefits in the amount of \$1,000.75.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey dated March 20, 1997, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Gordon Wogan, and against the respondent, Consolidated Freightways, Inc., a qualified self-insured, for an accidental injury that occurred on January 24, 1994, and based upon an average weekly wage of \$911.78.

Claimant is entitled to 70.57 weeks of temporary total disability compensation at the rate of \$313 per week or \$22,088.41, followed by 38.61 weeks of permanent partial disability compensation at the rate of \$313 per week or \$12,084.93 for a 25% permanent partial disability of the right upper extremity, making a total award of \$34,173.34, which is all due and owing and ordered paid in one lump sum less amounts previously paid.

All remaining orders of the Special Administrative Law Judge contained in the Award are adopted by the Appeals Board as if specifically set forth in this order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary R. Terrill, Overland Park, KS  
Frederick J. Greenbaum, Kansas City, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director